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PROPRIETARY CLAIMS AND HUMAN RIGHTS—A "RESERVOIR OF ENTITLEMENT"?

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I. INTRODUCTION

Two important decisions have recently considered the effect of human rights law on domestic property law: *Kay* v. *Lambeth L.B.C.; Leeds C.C.* v. *Price*,[1] and *J.A. Pye (Oxford) Ltd.* v. *United Kingdom*.[2] In each case, the claimant brought a domestic proprietary claim, one successfully, the other unsuccessfully, against a defendant. The aggrieved party argued that the domestic legal outcome conflicted with his rights under the European Convention on Human Rights. In each case, the court had to decide whether the Convention had indeed been infringed by the bringing of a proprietary claim and, if so, what the consequences of that infringement might be.

The cases brought into question the relationship between domestic property law and human rights. Until recently, the dynamics of that relationship have been difficult to predict. At one extreme, it had been suggested that the Convention might "fundamentally transform our law as to the enforcement of property rights";[3] and at the other extreme that the courts might reject "any interference with established property law principles in order to accommodate human rights".[4] More recently, Wilson L.J. has suggested that the Convention might represent a "reservoir of entitlement" for the party who loses under domestic property law.[5]

This article considers whether, in the light of *Kay; Price* and *Pye*, such a reservoir of entitlement does exist in relation to a proprietary claim and, if it does, what entitlement it offers. It looks

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[1] [2006] UKHL 10, [2006] 2 W.L.R. 570.

[2] (2006) 43 E.H.R.R. 3. The case is on referral to the Grand Chamber of the European Court of Human Rights.

[3] *R. (on the application of Gangera)* v. *Hounslow L.B.C.* [2003] EWHC (Admin) 794, [2003] H.L.R. 68, at [49], *per* Moses J.

[4] M. Dixon, "Adverse Possession and Human Rights" [2005] Conv. 345, 350.

[5] *Pirabakaran* v. *Patel* [2006] EWCA Civ 685, at [41].

at a range of proprietary claims, recognised by private law, from the recovery of possession to the enforcement of easements. The confiscation and the control of use of property by the state is excluded from the analysis. This article seeks to understand, rather than criticise, the emerging relationship between property law and human rights. It does this from the standpoint of property law, by treating domestic property law as a regime upon which human rights might have an impact, rather than the other way around. The difference is one of emphasis.

Kay; Price largely concerned Article 8 of the Convention, the relevant part of which provides for a qualified right to respect for one's home. *Pye* was different and focused on Article 1, Protocol 1, which provides qualified protection to property interests. Owing to its focus on *Kay; Price* and *Pye*, the analysis here is confined largely to these two particular Convention rights.[6]

The article suggests that some principles seem to be emerging from these cases. In particular, it draws attention to the merit in breaking down a proprietary claim into its various substantive and procedural elements. This makes it possible to identify in relation to which elements of the claim a reservoir of entitlement might arise. *Kay; Price*, in the context of Article 8, has begun the process of dissecting a proprietary claim. The article continues that process to provide a more detailed framework for analysing the effect of that Convention right. The framework is then used to explain the impact of Article 1, Protocol 1, in the light of principles emerging in *Pye*. Finally, the types of reservoir of entitlement created by the two Convention rights are brought together and compared.

II. The Violation and Enforcement of Convention Rights

For the losing party in a domestic proprietary claim to benefit from the Convention there are two requirements to satisfy. First, that person must demonstrate that a Convention right has been violated. A violation creates a right of action in respect of the Convention right that has been infringed. This forms a reservoir of extra entitlement which is available to the aggrieved party. Second, the person must tap into that reservoir by obtaining a particular remedy, in order practically to enforce his Convention right.

This article focuses on the first requirement, by considering under what precise conditions the bringing of a proprietary claim might violate the Convention.

[6] Other Convention guarantees which might have an impact on property law are Articles 6 (right to a fair trial), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of assembly and association) and 14 (prohibition of discrimination). See further K. Gray and S.F. Gray, *Elements of Land Law*, 4th ed. (Oxford 2005), pp. 131–134.

The second requirement is a matter of general human rights law and does not raise any issues distinct to proprietary claims. Nonetheless, it is useful to consider it in outline because the substantive content of a right of action generated by a violation of the Convention is necessarily defined by the remedies available for its enforcement. There are broadly two types of remedy.[7] First, the party who loses the domestic proprietary claim could require that the law be manipulated in order to give immediate effect to his Convention rights against the other party.[8] For this, he could invoke sections 3 and 6 of the Human Rights Act 1998. Section 3 would require a domestic court to read, if possible, any statute associated with a violating proprietary claim in a manner compliant with the Convention. If it is not possible to interpret the legislation in a compatible manner, certain higher courts may make a declaration of incompatibility under section 4. This declaration, however, does not offer a remedy in any real sense to the aggrieved party in the relevant action. Under section 6, a public authority, including a court, must not act in a manner that would be incompatible with the Convention. So if, for example, a local authority acted in breach of a Convention right, its action might be struck down. It remains to be seen quite how far a court's own duties under section 6 extend. On a wide reading of section 6, courts might be compelled to manipulate even the common law to give effect to Convention rights between two private parties.[9]

Secondly, if, for any reason, a party is unable to protect his Convention rights against his opponent in a domestic court under the Human Rights Act 1998, he can take his case to the European Court of Human Rights. This would involve bringing an action against the United Kingdom for breaching its treaty obligations under the Convention to protect its citizens' human rights. As a result, the United Kingdom would face liability under Article 41 of the Convention to make "just satisfaction" to the aggrieved party.[10]

III. Article 8: *Kay* v. *Lambeth*; *Leeds* v. *Price*

Kay; Price was a conjoined appeal, heard by a seven-strong appellate committee of the House of Lords. In each case, a local authority landowner, having a right to possession under domestic law, issued proceedings to evict the current occupiers. In *Kay*, a

[7] See generally Lord Lester and D. Pannick (eds.), *Human Rights Law and Practice* (London 2004), pp. 24 ff.
[8] A remedy of this type was sought in *Kay; Price*.
[9] For a summary of the arguments, see S.F. Deakin, A.C. Johnston and B.S. Markesinis, *Markesinis and Deakin's Tort Law,* 5th ed. (Oxford 2003), pp. 68 ff.
[10] This was the remedy sought in *Pye*.

local authority lawfully terminated a lease and sought to evict the occupiers. In *Price,* gipsies moved their caravans onto a local authority recreation ground; proceedings for possession were issued within two days. The occupiers in both cases could have sought judicial review of the public authorities' actions, on traditional public law grounds.[11] However, this course was not pursued and would have been unlikely to succeed.[12] The occupiers instead chose to argue, in their defence, that the land concerned was their "home" for which they had a qualified right to respect under Article 8 of the Convention and the Human Rights Act 1998. To succeed, they would have to show first that the right was engaged under Article 8(1) because there had been an interference with their "home"; and secondly, that the interference was not justified under Article 8(2). An interference with someone's home would be justified if it was sanctioned by domestic law, served a legitimate aim and a pressing social need, and the level of interference was proportionate to the legitimate aim being pursued.[13]

A. The Background to the Decision

The House of Lords faced two seemingly conflicting authorities: *Harrow L.B.C.* v. *Qazi*[14] and *Connors* v. *United Kingdom*.[15] *Qazi* involved similar facts to *Kay* and concerned a local authority seeking possession of its land from a former tenant. The House of Lords in *Qazi* found that the land constituted the occupier's "home" for the purposes of Article 8 even though the occupier had no domestic right to that property. It was a question of fact rather than law. Four of the Lords[16] agreed that eviction of the occupier would constitute an "interference" with his home and that therefore Article 8 was engaged. But their Lordships split three to two on the issue of justification. The minority considered that there was a possible violation of Article 8 and that the case should be sent back down to the County Court for performance of the proportionality test.

The ratio of the majority, although somewhat difficult to discern in detail, is broadly summarised by Lord Hope, where he said that "I agree with my noble and learned friends, Lord Millett and Lord Scott of Foscote, that the Strasbourg jurisprudence has shown that

[11] *Kay; Price* [2006] UKHL 10, [2006] 2 W.L.R. 570, at [110].
[12] *Ibid.*, at para. [209] *per* Lord Scott.
[13] See Lester and Pannick (eds.), *Human Rights Law and Practice* (note 7 above).
[14] [2003] UKHL 43, [2004] 1 A.C. 983.
[15] (2005) 40 E.H.R.R. 9.
[16] Lord Scott disagreed.

contractual and proprietary rights to possession cannot be defeated by a defence based on article 8''.[17]

This meant that where an interference with an occupier's home was sanctioned by domestic law, it would be futile to make an Article 8 challenge. It was not necessary to perform the proportionality test because it was a ''forgone conclusion'' that the interference was justified.[18] There was ''simply no balance to be struck''.[19] As Lord Phillips M.R. later observed, ''[i]mplicit in the majority's conclusion was the premise that the English domestic law which conferred the absolute right to possession was, itself, compatible with Convention rights''.[20] Lord Hope and possibly Lord Millett, however, seemed, to reserve their opinion, in *obiter dicta*, as to whether an Article 8 defence might succeed in ''exceptional circumstances''. Unfortunately, neither was clear as to when the exception might apply and what it might entail. This vague exception aside, after *Qazi,* proprietary claims sanctioned by national law were seemingly immune from an Article 8 challenge.

Subsequently, in *Connors* v. *United Kingdom* the European Court of Human Rights shattered that illusion of immunity.[21] A local authority had licensed certain gipsies to stay on its land. The gipsies behaved anti-socially. Lawfully under domestic law, the local authority terminated the licence without stating its reasons or giving the gipsies a chance to object to its decision. It then sought to evict the gipsy occupiers. In their defence, the gipsies argued that their Convention rights had been violated, the relevant one here being Article 8. The parties agreed that the gipsies' home had been interfered with but that the interference was lawful and served the legitimate aim of protecting the interests of the local authority and other gipsies on the site. The crucial issue was proportionality. The court found that Article 8 had been violated because the summary eviction had not been attended by sufficient procedural safeguards. The gipsies were a vulnerable minority whose needs attracted a high level of protection.

By accepting that Article 8 offered some extra entitlement to an occupier defending a proprietary claim, *Connors* appeared to be at odds with *Qazi* where the existence of any reservoir of privileges had been denied.

[17] [2003] UKHL 43, [2004] 1 A.C. 983, at [84].
[18] *Ibid.*, at para. [103], *per* Lord Millett.
[19] *Ibid.*
[20] [2005] EWCA Civ 289, [2005] 1 W.L.R. 1825, at [13].
[21] (2005) 40 E.H.R.R. 9.

Faced with these conflicting authorities, the Court of Appeal in both *Kay*[22] and *Price*[23] followed *Qazi* and rejected the Article 8 defence, but for different reasons in each case. *Kay* treated *Connors* as a discrete exception to the *Qazi* decision, an exception which only applied to cases concerning gipsies. By contrast, the Court of Appeal in *Price* considered *Connors* to be "unquestionably incompatible" with *Qazi* but deemed itself bound to follow *Qazi* as a matter of authority.[24]

B. The Decision

Against this background, the Lords in *Kay; Price* were invited to consider the cases under appeal and also to review their own decision in *Qazi*. Six out of the seven Lords gave fully-reasoned judgments. The speeches are difficult to penetrate but six points of agreement can be extracted concerning the defences available to the occupiers.

First, as a matter of domestic law, the local authorities' decisions to initiate possession proceedings were susceptible to judicial review, for example, on grounds of *Wednesbury* unreasonableness. Their Lordships accepted that the domestic public law challenge could be made either by application for judicial review in the Administrative Court or collaterally as a defence to possession proceedings in the County Court.[25]

Secondly, if the occupier wanted to argue that Article 8 conferred an extra reservoir of entitlement in a proprietary claim, which he could tap into, that argument too could be made directly as a defence to possession proceedings.[26]

Thirdly, their Lordships confirmed that "whether or not a particular habitation constitutes a "home" which attracts the protection of article 8(1) will depend on the factual circumstances, namely, the existence of sufficient and continuous links", rather than on any domestic legal entitlement to the property.[27] On the facts, the gipsies in *Price* had only been on the land for two days

[22] [2004] EWCA Civ 926, [2005] Q.B. 352.
[23] [2005] EWCA Civ 289, [2005] 1 W.L.R. 1825.
[24] *Ibid.*, at paras. [26] and [30], *per* Lord Phillips M.R. Note that the House of Lords in *Kay; Price* [2006] UKHL 10, [2006] 2 W.L.R. 570 confirmed that, as a matter of precedent, the Court of Appeal in *Price* had been correct to follow the House of Lords' decision in *Qazi*, despite a subsequent inconsistent Strasbourg ruling. See Lord Bingham, at [43], with whom the other Lords concurred.
[25] See *e.g. Kay; Price* [2006] UKHL 10, [2006] 2 W.L.R. 570, at [110].
[26] Note that it is generally possible to combine the first and second defences, although the issue was not directly addressed by the Lords in *Kay; Price*. This combined defence would involve the argument that the local authority had acted *ultra vires* according to the Human Rights Act 1998, s. 6, by purporting to rely on a decision that was incompatible with the Convention. See further P.P. Craig, *Administrative Law*, 5th ed. (London 2003), pp. 579–580.
[27] *Kay; Price* [2006] UKHL 10, [2006] 2 W.L.R. 570, at [129], *per* Lord Hope, drawing on the decision in *Buckley* v. *United Kingdom* 23 E.H.R.R. 101.

and could not call it their home. In *Kay,* the occupiers could complain that there had been an interference with their home, and so Article 8 had been engaged. Their lordships accepted that rules entitling local authorities to repossess their land served the legitimate aim of satisfying the housing needs of others under Article 8(2). The "crux" was proportionality.[28]

The fourth point concerned the crucial issue of whether the bringing of a claim to recover property would ever violate Article 8 as a disproportionate interference with a defendant's home. This involved confronting the apparent conflict between *Qazi* and *Connors*. Their Lordships agreed that, following *Connors,* the domestic regime might sometimes violate Article 8. *Qazi* needed to be qualified insofar as it seemed to regard the domestic law regulating proprietary claims as inherently compatible with the Convention. This meant that, at least to some extent, Article 8 did confer an extra degree of entitlement on the defendant.

Fifthly, however, demonstrating that Article 8 had been violated would remain difficult in practice. Their lordships all agreed that a tension exists between an occupier's right to raise an Article 8 defence and the "colossal waste of time and money" that would result if for every possession action the judge had to perform the proportionality test.[29] A compromise was reached. Courts should proceed on the "assumption" that domestic possession proceedings strike a proportionate balance and are therefore compatible with Article 8.[30] It was considered that land law has developed in such a way as to strike an appropriate balance between the "human, social and economic considerations involved".[31] Their Lordships agreed that only in those rare cases where an Article 8 infringement is "seriously arguable" should a court consider Article 8 and perform the proportionality test to see whether there had been a violation.[32] This approach would allay fears of the chaos that might ensue were the Convention to be considered in every possession case.

Finally, they agreed that there was no violation of Article 8 on the facts in *Qazi*, *Kay* or *Price*. In *Price*, there was no "home" which called for respect. In *Qazi* and *Kay*, their Lords considered the respective interferences with the defendants' homes to be justifiable and proportionate.

[28] *Kay; Price* [2006] UKHL 10, [2006] 2 W.L.R. 570, at [22], *per* Lord Bingham.
[29] *Ibid.*, at para. [55], *per* Lord Nicholls.
[30] *Ibid.*, at para. [109], *per* Lord Hope.
[31] *Ibid.*, at para. [33], *per* Lord Bingham.
[32] *Ibid.*, at paras. [39], *per* Lord Bingham, [56], *per* Lord Nicholls (with both of whom Lord Walker agreed), and [110], *per* Lord Hope (with whom Lords Scott and Brown and Baroness Hale agreed).

Although their Lordships agreed on these six points, they disagreed on one crucial issue. Their disagreement concerned what might constitute a "seriously arguable" Article 8 defence. Only where the defence is seriously arguable is the gateway opened for the court to consider whether Article 8 has been violated. In considering the issue, their Lordships dissected a proprietary claim into two parts. They drew a distinction between the legal rules surrounding a proprietary claim, and the actual application of those rules to particular facts.[33] In *Kay*, for example, the local authority was permitted by a system of rules to evict the occupier.[34] But those rules were only applied to the facts when the local authority decided to enforce them.

The minority of three (Lords Bingham, Nicholls and Walker) decided that it should be possible to challenge both the system of rules and its application. The majority disagreed with part of the minority's formulation. For Lords Hope, Scott and Brown and Baroness Hale, the only way to make a direct Article 8 challenge to the eviction proceedings would be to attack the rules themselves. In *Connors*, for example, procedural rules were found to breach Article 8 because they entitled a local authority to terminate the gipsies' licence without explanation. However, the majority in *Kay; Price* decided that if the rules themselves complied with the Convention, it necessarily followed that the application of those rules to any given facts would also comply.

C. The Impact of the Decision

The principle of breaking down a proprietary claim into two distinct parts—the rules and their application—is welcome. It enables the reservoir of entitlement created by a violation of Article 8 by the bringing of a proprietary claim to be more precisely located and understood. There were some hints at such an approach in *Qazi*. Lord Hope, in particular had stated that the actual decision in *Qazi* was confined to the application of the law to the facts at issue, and did not concern the law itself. However, he had asserted *obiter*, in strong terms, that domestic law would not itself be susceptible to challenge,[35] a view which has now been rejected by *Kay; Price*. The decision in *Kay; Price* brings the distinction between the law and its application into much sharper focus. One issue, however, remains unresolved by the decision.

[33] *Ibid.* See *e.g.* at paras. [110], *per* Lord Hope, and [182], *per* Baroness Hale.
[34] Domestic law allowed the local authority first to terminate the lease so that the occupiers became trespassers on the land, and then to take proceedings to evict the occupiers. See *ibid.*, at paras. [136] and [148], *per* Lord Scott.
[35] [2003] UKHL 43, [2004] 1 A.C. 983, at [74].

Whilst the principle of distinguishing between the system of legal rules and their application to particular facts is welcome, it is disappointing that their Lordships were not more precise in their reasoning. The legal rules applicable to a proprietary claim are many and varied. It is unclear from their speeches whether their lordships intended for all or just some types of these rules to be vulnerable to an Article 8 challenge. It is possible to take the process of dissecting a proprietary claim further than it was in *Kay; Price*. An alternative framework for analysis might divide the process of bringing a proprietary claim into the following three parts, according to which a claimant must:

(i) identify a proprietary right in an asset which entitles him to seek particular remedies;[36]
(ii) decide to make a claim to enforce that right; and
(iii) identify and follow the correct legal procedure for making the claim.

This framework builds on, but is more precise than, the distinction drawn in *Kay; Price* between the rules and their application. Parts (i) and (iii) of a proprietary claim concern the rules, and part (ii) their application.

Generally, in terms of domestic law, part (i) concerns substantive property law. This is a large and complex body of law which comprises "rules as to how persons can acquire, dispose of and lose rights to ... things, the various types of rights over things which may be acquired, the ways in which such rights can be held, and how far the rights [over] a particular thing are exigible against third parties".[37] The complex nature of substantive property law can be illustrated by the rules regulating a landlord's right to evict a tenant.[38] A landlord, when he leases the land, retains a reversionary interest which only comes into possession once the lease comes to an end. A combination of contractual and statutory leasehold terms establish when the lease might end—whether by lapse of time, the giving of notice, or forfeiture.[39] Once the lease has ended, the former tenant becomes a trespasser whom the landlord is entitled to evict.

Part (ii) of a proprietary claim is regulated by domestic public law where the claimant is a public body; where a private party brings a claim, however, domestic law is silent. Part (iii) of the

[36] See further G.J. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford 2006), p. 579.
[37] W. Swadling, "The Law of Property", in P. Birks (ed.), *English Private Law* (Oxford 2000), vol. 1, p 204.
[38] See generally R. Megarry and W. Wade, *Law of Real Property,* 6th ed., by C. Harpum (London 2000), ch. 14.
[39] For further ways in which a lease might determine, see *ibid*., at pp. 810–860.

claim is a matter of procedural law. For example, a landlord evicting a former tenant must follow the relevant procedural rules in order to bring his action.[40]

The three parts are not watertight categories and sometimes overlap. For example, the procedure used to forfeit a lease is intertwined with the extent of the landlord's substantive rights against a tenant. Despite such overlaps, the three parts provide a more precise analytical framework than that used in *Kay; Price*.

To advance a human rights argument in defence to a proprietary claim, the argument would necessarily target one or more of the three parts. The majority in *Kay; Price* seemed to regard part (ii) of the claim as immune from an Article 8 violation. The decision of a local authority to enforce its proprietary rights against a particular occupier was susceptible to to challenge on traditional administrative law grounds, for example on grounds of unreasonableness, either by application for judicial review or by way of defence in possession proceedings. However, it would not be possible to ground a defence solely in Article 8.[41] The reason given was that where a landlord's domestic proprietary and procedural rights are compatible with Article 8, the decision to enforce those rights is necessarily compliant also. It should be noted that this conclusion was not inevitable. Indeed, there have been cases, albeit not concerning proprietary claims, where a domestic regime itself has been deemed Article 8-compliant, but applied in an incompatible way.[42] Nevertheless, in the light of *Kay; Price*, for the time being at least, a defendant should be advised that no reservoir of entitlement is offered by Article 8 in respect of part (ii) of a claimant's proprietary claim.

However, their Lordships agreed that it would be possible to attack by Article 8 "the law which enables the court to make the possession order" in "seriously arguable" cases.[43] Such language is sufficiently broad to cover both substantive property law (part (i) of the proprietary claim) and the corresponding procedural rules

[40] See generally, Brooke (ed.), *Civil Procedure, The White Book Service* (London 2006), vol. 1, part 55.

[41] The majority did not consider the possibility, discussed in note 26 above, of seeking judicial review of a local authority landlord's decision on the ground that it violates a Convention right (see [2006] UKHL 10, [2006] 2 W.L.R. 570, paras. [110], *per* Lord Hope [190], *per* Baroness Hale, and [208], *per* Lord Brown). However, the tenor of their speeches would suggest that such a course of action would be very unlikely to succeed in such cases. If it is not possible to succeed in challenging the decision by direct reliance on Article 8 because the decision is deemed to be compatible with the Convention, success should be no more likely when reliance is placed on Article 8 in the context of a public law challenge.

[42] See *e.g. Gillow* v. *United Kingdom* (1986) 11 E.H.R.R. 335.

[43] [2006] UKHL 10, [2006] 2 W.L.R. 570, at [110], *per* Lord Hope, with whom the rest of the majority agreed. See also para. [39], *per* Lord Bingham, speaking for the minority, which agreed with the majority on this issue.

(part (iii) of the claim).[44] But whether the case is authority for such a broad proposition is open to question. Their lordships relied on *Connors* to illustrate the possibility that the system of law regulating a proprietary claim might, in exceptional circumstances, violate Article 8. However, the violation in *Connors* concerned procedure rather than substantive property rights. *Connors* therefore confirms only that part (iii)—the procedural aspect of a proprietary claim—is open to an Article 8 challenge.

It is far less clear whether substantive property law itself (part (i) of the proprietary claim) has the capacity to violate Article 8. If it does, the very existence of the claimant's proprietary right could be challenged. Article 8 would have the potential to affect the complex array of rules by which property rights are acquired, retained and lost under domestic law. The Convention right would create an extensive reservoir of entitlement, which, when tapped into, might wreak havoc within substantive property law. Take again the example of the rules regulating when a landlord might evict a tenant. Were Article 8 to tackle substantive property law, it might be possible to challenge the existence of the landlord's reversionary estate, or perhaps even the expressly bargained or implied terms of the lease which entitle the landlord to recover possession. Were it to have this effect, Article 8 would in effect have the potential, depending on the remedies available, to redistribute domestic proprietary entitlement.

Because their Lordships were not careful to distinguish substantive law from procedure, their broad comments must be treated with caution. Although no case would appear yet to have tested the issue, three observations can be made as to whether Article 8 might in future be able to strike at substantive property law.[45]

First, it should be noted that the issue concerns two competing Convention rights: the occupier's Article 8 right; and the owner's right to have his property rights protected under Article 1, Protocol 1. Both Convention rights are qualified in a way which allows the interests under the competing article to be taken into account. In such circumstances of competing Convention rights, it is generally up to the court "to hold the balance".[46] It would run against the spirit of the Convention for one qualified right to have automatic priority over another qualified right.

[44] It should be noted that Lord Scott, in part of his judgment, appeared to draw a distinction between law and procedure: see paras. [156]–[160]. He nonetheless agreed with Lord Hope's broader position.

[45] *Ibid.*, at para. [67], *per* Lord Hope.

[46] *A* v. *B (a company)* [2002] EWCA Civ 337, [2003] Q.B. 195. See further H.W.R. Wade and C.F. Forsyth, *Administrative Law*, 9th ed. (Oxford 2004), p. 178.

Secondly, however, whilst it would appear to remain a theoretical possibility after *Kay; Price* that substantive property law might infringe Article 8, the tenor of their Lordships' speeches suggests that in practice, it is most unlikely that a court would be persuaded of a violation. The speeches suggest that property law, having developed over time in response to competing claims to land, is likely already to provide a proportionate balance between individuals' rights to respect for protection of their homes and the need to regulate land use. Their lordships considered this to be especially true of statute law, which Parliament has expressly considered.[47] Whether or not a rule will in practice be found to infringe the Convention might therefore depend on whether or not it is contained in a statute.[48] Even non-statutory rules are likely to infringe the Convention only if their operation has proved to be particularly controversial within domestic law.[49]

Finally, whilst it is uncertain whether Article 8 on its own can affect substantive property rights, it is clear that when combined with Article 14, which confers freedom from discrimination, it can do so.[50] This occurred, for example, in *Ghaidan* v. *Godin-Mendoza*.[51] The claimant landlord's flat had been held under a protected tenancy by the deceased, who had, until his death, been living there in a homosexual relationship with the defendant. On the tenant's death, the claimant issued proceedings to evict the defendant. Domestic legislation provided that a surviving spouse had the right to succeed to a protected tenancy.[52] The legislation extended to heterosexual partners, but not, under its ordinary meaning, to same-sex partners.[53] This meant that under domestic

[47] See *e.g.* [2006] UKHL 10, [2006] 2 W.L.R. 570, at [192], *per* Baroness Hale.

[48] Consider the distinction in the context of the substantive rules which determine when a landlord might evict a tenant. Some are contained in statute, for example, the distinction between leasehold and freehold estates (Law of Property Act 1925, s.1(1)); others are rooted in common law, such as the rule that whilst a lease in on foot, the tenant has a right of exclusive possession against the landlord (*Street* v. *Mountford* [1985] A.C. 809). Furthermore, some other rules emanate from the parties' agreement, such as express terms in the lease. This final category is unlikely to be a disproportionate Article 8 interference, the tenant having expressly agreed to limit his rights.

[49] See *e.g.* the suggestion made by S. Pascoe in "Can a Joint Tenant Remain in Possession after the Other Joint Tenant has given Notice to Quit?" [2004] Conv. 370, that the controversial domestic law rule, formulated in *Hammersmith and Fulham L.B.C.* v. *Monk* [1992] 1 A.C. 478, which allows one joint tenant to determine a lease without the consent of the other joint tenant, might be incompatible with Article 8. See also I. Loveland, "After Qazi: Part 1: Sole Tenant Termination of Joint Tenancies and Article 8 ECHR" [2005] Conv. 123.

[50] Article 14 provides that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

[51] [2004] UKHL 30, [2004] 2 A.C. 557. For another example, see *Larkos* v. *Cyprus* (1999) 30 E.H.R.R 597.

[52] Rent Act 1977, Sched. 1.

[53] This had been decided previously by the House of Lords in *Fitzpatrick* v. *Sterling Housing Association Ltd.* [2001] 1 A.C. 27.

law the defendant had no right to remain in the flat. He argued, however, that the flat was his home under Article 8. Had he been in a heterosexual relationship, he would succeed to the tenancy and his home would be protected. Because this protection did not extend to unmarried homosexual couples, he argued that Article 14, in conjunction with Article 8, had been breached. There was, he argued, no rational or fair ground for the discrimination. The House of Lords accepted this argument. A defence based on Article 8 alone would not have succeeded.[54] However, when Articles 8 and 14 were combined, the defendant's Convention rights had been violated. This created a reservoir of entitlement in favour of the defendant. Their Lordships allowed the defendant to tap into this reservoir by interpreting the legislation, contrary to its ordinary meaning, to give same-sex partners the right to succeed to protected tenancies. This in effect entailed a redistribution of proprietary entitlement.

In summary, Article 8 can offer a reservoir of extra procedural entitlement to someone defending a proprietary claim. When combined with Article 14, it can also create additional substantive proprietary entitlement. But the extent to which Article 8 in isolation from Article 14 might have this effect remains to be determined.

D. Conclusion

The decision in *Kay; Price* marks a big step forward in terms of understanding the relationship between Article 8 and proprietary claims. The case identifies the need to distinguish between different parts of a proprietary claim in order to locate precisely any reservoirs of entitlement which Article 8 might offer the defendant. With hindsight, the general approach in *Qazi*, which treated the proprietary claim as an indivisible whole, appears clumsy. Although their Lordships in *Kay; Price* were more focused than in *Qazi*, it is disappointing that the facts before them did not require them to take the principle of dividing a proprietary claim into constituent elements even further. The division of a proprietary claim into three, rather than two, parts offers a framework within which the law might better be understood.

In the next section, this same framework is applied to assess the impact of Article 1, Protocol 1 on proprietary claims.

[54] [2004] UKHL 30, [2004] 2 A.C. 557, at [6], *per* Lord Nicholls.

IV. Article 1 of the First Protocol: *Pye* v. *United Kindom*

Article 1, Protocol 1 of the Convention protects against interferences with the "peaceful enjoyment of [one's] possessions" or, in other words, one's right to property. However, the protection guaranteed by Article 1, Protocol 1 is not absolute, but qualified, as is Article 8. Accordingly, one's right to property is not violated by an interference which is sanctioned by domestic law, is in the public interest and where domestic law strikes a fair balance between the legitimate end being pursued and the level of interference.[55]

Pye v. *United Kingdom* is the latest development in an important line of cases which consider the relationship between domestic proprietary claims and Article 1, Protocol 1.

A. The Decision

Pye concerned the compatibility of certain domestic rules of adverse possession with Article 1, Protocol 1. Squatters had been in adverse possession of the claimant company's land for 15 years, without permission. In 1999, the claimant issued possession proceedings against them. In their defence, the squatters argued that the former Land Registration Act 1925, combined with the Limitation Act 1980, deemed the claimant to hold the registered estate on trust for them so that they were entitled to be registered as proprietors of the land in place of the claimant.[56] The House of Lords agreed. The registered proprietor then claimed that the domestic regime infringed his rights under Article 1, Protocol 1. Unfortunately for the owner, the facts arose before the Human Rights Act 1998 came into force, so it was forced to take its case to the European Court of Human Rights. A majority of four to three in the European Court found that Article 1, Protocol 1 had been violated, for reasons which are considered below. The violation created a reservoir of entitlement into which the owner could tap. The owner would receive the benefit of that reservoir in the form of reparation damages payable by the United Kingdom.[57]

It should be noted that had the Human Rights Act 1998 been applicable, the owner might not have lost its land to the squatters. This very issue came before the High Court in *Beaulane Properties* v. *Palmer* shortly before the decision in *Pye* v. *UK* was handed

[55] See further T. Allen, *Property and the Human Rights Act 1998* (Oxford 2005), ch. 5.
[56] Limitation Act 1980, sections 15 and 17; Land Registration Act 1925, s. 75. Note that these provisions have now been disapplied and replaced, in relation to registered land, by the Land Registration Act 2002, s. 96, Sched 6.
[57] European Convention on Human Rights, para. 41.

down.[58] In a brave decision, the judge first decided that the application to the facts of the former Land Registration Act 1925 adverse possession regime in accordance with its settled meaning was incompatible with Article 1, Protocol 1.[59] That settled meaning did not require, in order for possession to be "adverse", for it to be inconsistent with the owner's intended use of the land.[60] The judge then used section 3 of the Human Rights Act to interpret the relevant domestic legislation in such a way as to render it compliant.[61] This involved requiring possession to be inconsistent with the owner's actual or intended use of the land in order to constitute "adverse" possession.[62] Because on the facts there was no such inconsistency, the registered proprietor retained its land.

New claims by squatters to registered land would not raise the same issues because the regime applicable in *Pye* and *Beaulane* has been replaced by a wholly different one by the Land Registration Act 2002. The new regime renders it much more difficult for squatters to acquire registered land. Although the issue is not settled, the new rules were implicitly regarded as Convention-compatible in *Pye*. Although they concern an old domestic regime, *Pye* and *Beaulane* are nevertheless instructive in recognising, at their most basic level, that proprietary claims might conflict with Article 1, Protocol 1, and as a result create a reservoir of extra entitlement into which one of the parties might be able to tap.

To locate this reservoir precisely, however, involves determining under precisely what conditions Article 1, Protocol 1 might affect a proprietary claim. In this respect, *Pye* confirms and illuminates a trend which had been emerging in some earlier cases. These cases are therefore included in the analysis set out below. To make sense of the trend, the analysis applies the framework, identified earlier, which dissects a proprietary claim into three parts.

B. The Impact of Article 1, Protocol 1 on the Three Parts of a Proprietary Claim

In this section it is useful to consider separately first the conditions under which the Convention right is engaged; and secondly,

[58] [2005] EWHC 817, [2006] Ch. 79.

[59] See further Dixon, "Adverse Possession and Human Rights" (note 4 above); and A. Cloherty and D. Fox, "Heresies and Human Rights" [2005] C.L.J. 558.

[60] See *e.g. J.A. Pye (Oxford) Ltd.* v. *Graham* [2000] Ch. 676.

[61] Note that because the judge was able to interpret the law on the facts in such a way as to allow the original owner to retain his land, he did not need to declare the whole statutory adverse possession regime to be incompatible with the Convention by issuing a statement of incompatibility under Human Rights Act, s. 4. In this respect, the decision is not as far-reaching as that in *Pye*.

[62] This, he alleged, was the meaning which "adverse possession" bore when the 1925 Act was passed. But note the doubts cast on this interpretation by Fox and Cloherty, "Heresies and Human Rights" (note 59 above).

whether an interference with the right can be justified. Whereas the cases have decided that the engagement of Article 8 is a matter of fact, the engagement of Article 1, Protocol 1 raises important matters of law.

1. Engaging the Convention right

For a proprietary claim to engage Article 1, Protocol 1, it must interfere with another party's proprietary interests. *Pye* confirms that a test for determining when the right is engaged is evolving.

At one stage, it was unclear whether proprietary claims would ever engage the Convention right. Take, for example, a claimant who acquires an easement by prescription over the defendant's land and who then seeks to enforce that easement. The defendant might raise Article 1, Protocol 1 in his defence. At one stage, however, it was considered arguable that the defence would necessarily fail because the defendant's proprietary rights as owner of the land were intrinsically restricted. According to this argument, inherent in ownership of land was the possibility that someone might acquire a prescriptive easement. Therefore, by acquiring and enforcing an easement, a claimant would not interfere with the defendant's property rights at all.

However, this argument, whilst technically compelling, would largely strip Article 1 of any sensible meaning. Indeed, one type of conduct which Article 1, Protocol 1 typically regulates is arbitrary compulsory acquisition of private property by the State. If one were to say that all property is inherently liable to compulsory acquisition, Article 1, Protocol 1 would rarely, if ever, bite.[63] The Convention is supposed to guard against interference with property rights. To say that Article 1, Protocol 1 fails to be engaged because property rights are inherently vulnerable is logical, but circular. The courts have become wary of this argument and have started to develop means to avoid it.

In a line of cases, the most recent being *Pye*, courts have become astute to distinguish carefully between those circumstances where a property interest is indeed inherently limited, and therefore not protected by Article 1, Protocol 1, from those which conversely do involve an interference with property.

The first category includes *Aston Cantlow* v. *Wallbank*.[64] The defendants had acquired land to which chancel repair liability attached. Although strictly *obiter* because the case was decided on

[63] See further *Wilson* v. *First County Trust Ltd. (No.2)* [2003] UKHL 40, [2004] 1 A.C. 816, at [40]–[44].
[64] [2003] UKHL 37, [2004] 1 A.C. 546.

other grounds,[65] three of their Lordships said that the defendants' rights as freehold owners were inherently limited by the existence of the chancel repair liability. Therefore Article 1, Protocol 1 would not have been engaged anyway. As Lord Hope stated, "[chancel repair] liability is simply an incident of the ownership of the land which gives rise to it".[66]

Beaulane and *Pye* belong in the second category. It was argued in both cases that the statutory provisions on adverse possession "delimit [the owner's] right, but do not deprive it of its property" because an owner's right is inherently "defeasible".[67] The argument was rejected in both cases. The judge in *Beaulane* thought that there was a difference between cases where an owner had a right subject to a law which might, and consequently did, strip the owner of a right (which does engage Article 1, Protocol 1); and cases where an owner's right was qualified from the start (which does not). An adverse possession case, in his view, was of the former type. The majority in *Pye* agreed, stating that the adverse possession rules only "bit" at the end of 12 years' adverse possession, rather than "delimiting the [owner's] right at the moment of its acquisition".[68]

The facts in *Beaulane* and *Pye* engaged Article 1, Protocol 1, and those in *Aston Cantlow* did not. However, defining exactly when a case will fall on one side of the line rather than the other is difficult. The principle emerging from the decisions appears to be that Article 1, Protocol 1 bites only where a proprietary claim, when successfully brought, would result in a shift in the beneficial incidents of proprietary entitlement from one party to another. It has no part to play where a party's domestic property rights are inherently limited from the outset and therefore remain static.

According to this interpretation, Article 1, Protocol 1 was not engaged in *Aston Cantlow* because a shift in entitlement was not in issue; instead, only the static existence and the enforcement of the claimant's domestic right were challenged. Although the initial creation of the chancel repair liability would have engaged Article 1, Protocol 1, that event predated the Convention.

By contrast, Article 1, Protocol 1 was used to challenge a shift in proprietary entitlement—from owner to squatter—in *Beaulane* and *Pye*. Because adverse possession rules were viewed as a matter of shifting proprietary rights, they engaged the Convention.

[65] It was decided that the claimant was not a public authority within the meaning of s. 6 of the Human Rights Act 1998. As a result, its conduct could not be impugned in a domestic court.
[66] [2003] UKHL 37, [2004] 1 A.C. 546, at [72], *per* Lord Hope.
[67] *Kay; Price* [2005] EWHC 817, [2006] Ch. 79, at [139], *per* Lord Scott.
[68] (2006) 43 E.H.R.R. 3, at [52].

Because Article 1, Protocol 1 is only engaged by a shift in proprietary entitlement, it becomes necessary to be able to distinguish those situations where there is a shift from those where there is not.

The ending of a lease is an example of where there is no shift in proprietary entitlement, because the lessee's rights are circumscribed by the terms of the lease from the outset.[69]

By contrast, outright transfers of existing interests, such as a conveyance of a freehold estate in land, would involve a shift in entitlement that engages Article 1 Protocol 1. Property adjustment on divorce engages Article 1, Protocol 1 for similar reasons.[70] So too would the creation of new rights affecting a prior interest, for example, the creation of an express or implied trust or an estoppel interest or the prescription of an easement over land.[71] In these examples, the holder of the newly created right obtains the benefit of incidents of enjoyment of the property that would otherwise be with the original proprietor. Probably also included, and for a similar reason, would be the loss of priority as against a registered purchaser of an interest in land under section 29 of the Land Registration 2002.[72] That is because the postponed right, whilst technically still in existence, has effectively been stripped of the benefits it would otherwise confer.

Sometimes, however, it is very difficult to determine whether facts involve the enforcement of a static entitlement, or instead a shift in proprietary rights. This is illustrated by the following examples.

First is the decision of the House of Lords in *Wilson* v. *First County Trust Ltd. (No.2)*.[73] The claimant pawned her car to the defendant pawnbrokers for six months in return for a £5000 loan. The agreement between the parties was, however, unenforceable because certain statutory formal requirements had not been met.[74] Under domestic law, the claimant could recover her car without

[69] *Pye* v. *United Kingdom* (2006) 43 E.H.R.R. 3, at [52]. See also *Kay* [2004] EWCA Civ 926, [2005] Q.B. 352, at [107]–[108]; and *Lancashire C.C.* v. *Taylor* [2004] EWHC 776, [2005] 1 P. & C.R. 2, at [57], confirmed on appeal in [2005] EWCA Civ 284; [2005] 1 W.L.R. 2668.

[70] *Wilson* v. *First County Trust Ltd. (No.2)* [2003] UKHL 40, [2004] 1 A.C. 816, at [42] and [106].

[71] See *e.g. R (Whitmey)* v. *Commons Commissioners* [2004] EWCA Civ 951, [2005] Q.B. 282, at [36], *per* Arden L.J.

[72] The Law Commission envisaged that this would engage Article 1, Protocol 1 in Law Com No 254, *Land Registration for the Twenty-First Century: A Consultative Document* (1998); and Law Com No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001). Note, however that in Law Com No 254, at paras. 4.27–4.30, it was envisaged that the actual reduction in status of an interest from one that would override to one that is liable to be postponed would itself engage Article 1, Protocol 1. This probably is not correct: it is probably the actual loss of priority, not the potential loss, that constitutes the shift in proprietary entitlement.

[73] [2003] UKHL 40, [2004] 1 A.C. 816.

[74] Consumer Credit Act 1974, s. 127(3).

having to pay back the loan. The defendant sought to rely on Article 1, Protocol 1 to argue that the statutory formal requirements deprived them of their assets (namely the contractual right against the claimant and the security right in the property) which it would otherwise have. The claimant argued that the defendant's rights were inherently limited by the existence of the statutory formality requirement. Ultimately, the defendants' claim failed on another ground,[75] but four of their Lordships commented, *obiter*, on the issue. Lords Hope and Scott decided that the defendants' rights were inherently limited and that therefore Article 1, Protocol 1 did not bite. Lord Nicholls, conversely, said that the statute had indeed deprived the defendants of rights they would otherwise have; Lord Hobhouse was more equivocal, saying that it depended on the passing of possession. The lack of a clear majority view demonstrates the difficulty sometimes of determining exactly when Article 1, Protocol 1 might bite.

Secondly, the judge in *Beaulane* seemed open to the possibility that adverse possession of unregistered, as distinct from registered, land might not engage Article 1 Protocol 1. He envisaged that there might be a distinction between depriving someone of register-based title and depriving someone of possession-based title. However, in both situations, there is a shift in priority of entitlement from one person to another. This should be sufficient to trigger Article 1 Protocol 1.

A third problem concerns the effect on a trust beneficiary of an overreaching sale of trust property by the trustees to a third party. The effect of overreaching is for the third party disponee to take free of the beneficiary's interest in the original property, and for the trustees to hold the proceeds of the sale on trust for the beneficiary.[76] A sale by the trustees will only have overreaching effect where the trustees are empowered to make that particular disposition. That power is often drafted into the terms of the relevant trust deed. In such cases, the beneficiary's interest in the original property can be said to be inherently limited from the outset,[77] such that Article 1, Protocol 1 is not engaged when overreaching takes place. However, a more difficult issue arises when a sale has overreaching effect not by virtue of an express provision in the trust instrument, but by the operation of statute. For example, statute provides that a conveyance of land by two

[75] Their Lordships decided that the Human Rights Act 1998 could not be applied retrospectively.

[76] See generally D. Fox, "Overreaching" in P. Birks and A. Pretto (eds.), *Breach of Trust* (Oxford 2002), Ch. 4.

[77] See R. Nolan, "Understanding the Limits of Equitable Property" (2006) 1 *Journal of Equity* 18, 23–24.

trustees will overreach any beneficial interest under the trust, notwithstanding that the sale might constitute a breach of trust by the trustees.[78] On the one hand, it might be possible to regard the statutory provision as limiting the beneficiary's interest from the outset, just as if the power to overreach had been drafted into the trust instrument. On the other hand, the beneficiary's interest might only be limited once the statutory provision is actually triggered, and not by the mere possibility that it might be triggered. This second interpretation might be more consistent with *Pye,* which decided that a registered owner's estate in land was not inherently limited by the mere existence of statutory adverse possession provisions; rather, the owner was deprived of his property only upon the actual operation of those provisions.[79] It remains to be seen which interpretation the courts will adopt in the context of Article 1, Protocol 1.[80]

Related to this is a fourth problem, which concerns a court-ordered sale of co-owned property under section 14 of the Trusts of Land and Appointment of Trustees Act 1996, pursuant to an application by one of the co-owners. Whether that co-owner can use Article 1 of the First Protocol 1 rests again on the difficult issue of whether a co-owner's proprietary interest is inherently vulnerable to a sale under section 14, or whether such a sale amounts to a deprivation of property. Unfortunately, the issue has yet to receive precise and direct judicial consideration.[81]

These difficult issues aside, the guiding principle emerging from the cases is that Article 1, Protocol 1 is only engaged by a shift in proprietary entitlement from one party to another. Two further points can be made to fine-tune the principle. These concern the impact of Article 1, Protocol 1 on the three parts of a proprietary claim.

First shifts in proprietary entitlement are determined by the rules of substantive property law. This means that part (i) of a proprietary claim is vulnerable to an Article 1, Protocol 1 challenge. Conversely, parts (ii) and (iii) of the claim are not concerned with abstract shifts in entitlement; rather they involve the practical enforcement of pre-existing rights which already delimit

[78] Law of Property Act 1925, sections 2 and 27. For an example of this occurring, see *City of London Building Society* v. *Flegg* [1988] A.C. 54.

[79] (2006) 43 E.H.R.R. 3, at para. [50].

[80] Appropriate facts for consideration of the point arose in *National Westminster Bank Plc.* v. *Malhan* [2004] EWHC 847, [2004] 2 P. & C.R. DG9. However, it was conceded that Article 1, Protocol 1, on its own, would not be engaged.

[81] There are suggestions in *Nicholls* v. *Lan* [2006] EWHC 1255 that the right might be engaged. However, see *Hughes* v. *Paxman* [2006] EWCA Civ 818, at [28], where, in relation to a co-owned patent, it was considered an incident of co-ownership that rights could be altered by application to a comptroller.

the defendant's interest. As a result, parts (ii) and (iii) are, in themselves, incapable of engaging Article 1, Protocol 1.

Secondly, where a defendant challenges part (i) of the claimant's proprietary claim, the defendant must challenge not the mere existence of the claimant's right, but the mechanism by which the proprietary entitlement to the asset concerned might have shifted, under domestic law, from the defendant to the claimant. Take the example, considered earlier, of a claimant acquiring a prescriptive easement over the defendant's land, and who now seeks to exercise his prescriptive rights. The defendant cannot use Article 1, Protocol 1 to argue that the mere existence of the claimant's right infringes the Convention. Instead, he should target the mechanism by which that right came into existence. He would therefore argue that Article 1, Protocol 1 was engaged by the operation of prescription which allowed proprietary entitlement to shift from himself to the claimant. As a result, it can be said that Article 1, Protocol 1 does not have the effect of giving the defendant any additional substantive rights that he has not once enjoyed; rather, it regulates the manner in which the defendant might have lost any proprietary entitlement.[82]

In summary, Article 1, Protocol 1 is engaged only by part (i) of a proprietary claim and furthermore only by a subdivision of part (i), where it can be shown that there has been a shift in proprietary entitlement from one party to another. However, whether or not an engagement of Article 1, Protocol 1 ultimately results in an infringement of the Convention depends on the issue of justification.

2. Justification

The courts, under the justification test, scrutinise the manner in which the shift in proprietary entitlement occurred. Only a flavour of the approach taken by the courts can be given here.[83] The court will look first for a public interest in the interference, which is sanctioned by law. It will then look to see whether a "fair balance" has been struck between the demands of the public or general interest of the community and the requirements of the protection of the individual's fundamental rights. In making this inquiry, the courts tend to allow domestic policy-makers an area of discretion.[84] Interferences with Article 1, Protocol 1 are relatively easy to justify.

[82] See Auld L.J. in *Kay* [2004] EWCA Civ 926, [2005] Q.B. 352, at [108]. See also *Money Markets International Stockbrokers Ltd. (In Liquidation)* v. *London Stock Exchange Ltd.* [2002] 1 W.L.R. 1150, at [141]–[143].

[83] An excellent account is given in T. Allen, *Property and the Human Rights Act 1998* (Oxford 2005), ch. 5.

[84] *Ibid.*, pp. 125–130.

But it will be seen from recent cases that justification is by no means a forgone conclusion. This contrasts with Article 8, where certain parts of proprietary claims are treated as automatically complying with the Convention.

Examples of justifiable shifts in proprietary entitlement would include a consensual conveyance or creation of an express trust.[85] The *Wilson* case provides another example. By statute, a pawnbroker's contractual and security rights were void because certain formalities were not observed. Although their Lordships disagreed on the engagement issue, they agreed that any interference with the Convention would be justifiable anyway. This was because having strict formality requirements was a proportionate means of ensuring consumer protection. Probably also justifiable is the loss of unprotected interests in favour of a purchaser of registered land. The Law Commission, when drafting the Land Registration Act 2002, was careful to ensure that the public interest in a purchaser being able to rely on the Land Register would justify the loss of certain unprotected rights.[86]

Whilst many interferences are justifiable, a few are not, as demonstrated by *Beaulane* and *Pye*. The domestic regime allowed a squatter to acquire beneficial ownership of registered land automatically after being in adverse possession for 12 years. In *Beaulane*, the High Court found that the operation of the adverse possession regime under the Land Registration Act 1925 served no public purpose at all, but that if it did, it was nonetheless disproportionate.[87] The reasoning in *Pye* was slightly different and should be preferred. The majority in the European Court said that the domestic regime had a legitimate aim,[88] but that the manner in which it operated did not strike a fair balance between the proprietor's and the public's respective interests. This was because first no compensation was payable to the dispossessed proprietor; and secondly there was a lack of procedural protection for the proprietor: under domestic law, the owner could lose beneficial ownership of the property after 12 years without receiving notification of the squatter's presence.

It should be noted that, as for Article 8, it is possible to combine Article 1, Protocol 1 with Article 14 of the Convention.[89]

[85] See *Holy Monasteries* v. *Greece* (1995) 20 E.H.R.R. 1, at [76]–[78].
[86] Law Com No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001), at para. 8.89.
[87] [2005] EWHC 817, [2006] Ch. 79, at [188]–[203].
[88] In the sense that they prevent stale claims, and also ensure that the "reality of unopposed occupation of land and its legal ownership coincide": *Pye* (2006) 43 E.H.R.R. 3, at [65].
[89] Note that Article 1, Protocol 1 must be engaged before Article 14 can be invoked in combination therewith. See *e.g. Money Markets International Stockbrokers Ltd. (In Liquidation)* v. *London Stock Exchange Ltd.* [2002] 1 W.L.R. 1150, at [141].

If the party concerned can show that property law both deprives him of his proprietary interests and does so in a discriminatory manner, he is more likely to succeed in demonstrating that the relevant law is unjustifiable than if he relied on Article 1, Protocol 1 alone.[90]

From this brief survey of the case law, it is apparent that rarely will the bringing of a domestic proprietary claim violate Article 1, Protocol 1. However, justification is not a forgone conclusion. Where the operation of a rule really does not strike a fair balance between the need to respect individuals' property rights and the public interest, courts are prepared to balance the respective interests and if necessary find an incompatibility. Article 1, Protocol 1 therefore has a stabilising effect by ensuring that proprietary entitlements only shift under justifiable conditions.

V. Conclusion

It is possible to regard any violation of the Convention as creating a "reservoir of entitlement" into which one of the parties to a proprietary claim might be able to tap, in order to improve on his domestic legal position. This article set out to identify whether, in the light of *Kay; Price* and *Pye* v. *UK*, Article 8 or Article 1, Protocol 1 gives rise to any such reservoir and, if so, under what conditions.

Recent case law confirms that the bringing of a proprietary claim is capable of infringing both Convention rights, although violations of either occur very rarely. Both Convention rights are therefore capable of offering some extra entitlement to the aggrieved party, beyond that offered by domestic law.

Furthermore, it is becoming clearer that Article 8 and Article 1, Protocol 1 target respectively very distinct elements within a proprietary claim. *Kay; Price* began the process of dissecting a proprietary claim into its constituent parts. This article has continued that process to provide a framework for analyzing in relation to which part or parts of a proprietary claim a reservoir of entitlement might arise. Using that framework, the following general conclusions can be drawn.

First, the claimant in a proprietary claim must identify a property right in an asset, enforceable against the defendant. If the asset is the defendant's home, the substantive proprietary rules giving the claimant a property right might themselves, in exceptional circumstances, violate Article 8. The issue awaits further judicial clarification. If this part of the claim requires the claimant

[90] See *e.g. Chassagnou* v. *France* (2000) 29 E.H.R.R. 615.

to show that a property right, or the substantial beneficial incidents of a property right, has shifted from the defendant to himself, Article 1, Protocol 1 is engaged, and also potentially violated.

Secondly, the claimant must decide to enforce his property right. This decision can be challenged either by way of an application for judicial review, or by reliance on the unlawfulness of the decision as a defence in possession proceedings, but only where the decision-maker is a public body. The decision is not susceptible to a direct challenge under Article 8. Furthermore, because it involves no shift in abstract proprietary entitlement, Article 1, Protocol 1 is not engaged.

Thirdly, the claimant must identify and follow the correct procedural rules to enforce his property right. These rules are vulnerable to a challenge under Article 8, but they do not engage Article 1, Protocol 1.

In some situations, it is easy to fit the framework to the facts concerned. Take, for example, a private landlord seeking possession to evict a tenant once the lease comes to an end. Under domestic law, the tenant has no defence. The tenant can, however, probably use Article 8 to challenge the rules of property which give the landlord the right to repossess the property, and can certainly target the procedural rules allowing the landlord to do so. Article 1, Protocol 1 is not engaged because the termination of a lease involves no shift in proprietary entitlement.

Sometimes, however, the framework is more difficult to apply. A conveyance by two trustees of a home will by statute overreach any beneficial interests in the property. The beneficiaries might rely on Article 8 to try to attack the legal rules themselves. But beneficiaries' ability to use Article 1, Protocol 1 rests on the difficult issue of whether a beneficiary's interest is inherently vulnerable to the statutory overreaching provisions, or whether the operation of those provisions amounts to a deprivation of property. The issue has yet to be resolved.

In summary, Article 8 and Article 1, Protocol 1 do offer extra reservoirs of entitlement in relation to a proprietary claim, and they do so in relation to particular parts of that claim. Whilst *Kay; Price* and *Kay* have brought us closer to understanding when these reservoirs arise, there are many issues which require further clarification. Furthermore, it must not be forgotten that the number of occasions where proprietary claims have been found to violate the Convention is very small. Litigants should be warned that whilst the Convention might offer a reservoir of possible arguments in the context of a proprietary claim, it is only rarely that those arguments translate into actual entitlement.